Wood Use — U.S. Competitiveness & Technology, Congress of the United States, Office of Technology Assessment (August, 1983).

Table 2. — Countries with Largest Forested Areas

	Exploitable forest area (million ha)[a] [b]	Growing stock (million meters[3] over bark)[c]			Industrial harvest (billion ft[3])
		Total	Coniferous	Broadleaved	1977
U.S.S.R.	389	74,710	62,000	12,710	10.0
Brazil	305	47,088	98	46,990	1.5
United States	195	20,132	12,906	7,226	11.5
Canada	191	19,645	15,571	4,074	5.1

[a] Exploitable forest definitions differ by country. Some countries such as Canada have restrictive definitions that result in conservative estimates of exploitable forestland. Volume estimates for the U.S.S.R. include growing stock on some 110 million acres (44.5 million ha) considered to be unproductive forestland.

[b] To convert hectares to acres, multiply by 2.471.

[c] To convert cubic meters to cubic feet, multiply by 35.31.

SOURCES: United Nations Food and Agricultural Organization, *Yearbook of Forest Products, 1979* (Rome, 1981); G.M. Bonner, *Canada's Forest Inventory 1981* (Environment Canada, 1982); United Nations Environment Program /Food and Agricultural Organization, *Los Recorsos Forestales de la American Tropical* (Rome, 1981); United Nations Economic Commission for Europe, *European Timber Trends and Prospects, 1950 to 2030* (Geneva, 1976); U.S. Department of Agriculture Forest Service, *An Analysis of the Timber Situation in the United States, 1952-2030* (Washington, D.C.: 1982).

Table 3. — Major World Producers of Selected Wood Products

	Industrial roundwood	Sawn softwood	Sawn hardwood	Plywood	Pulpwood and chips[a]	Paper and board
United States	308	58	17	16	109	57
U.S.S.R.	278	87	12	2	38	9
Canada	156	41	—	2	39	13
Sweden	49	—	—	—	26	6
Finland	44	—	—	—	19	6
Japan	—	31	6	8	—	18
People's Republic of China[b]	—	13	8	—	—	5
Brazil	—	—	6	—	—	3
Korea	—	—	—	2	—	2

[a]Pulp production figures are in millions of metric tons. All other products are in million cubic meters.

SOURCES: FAO Yearbook, 1980; National Forest Products Association and the U.S. Foreign Agricultural Service, *Wood for the World, Today and Tomorrow*, n.d.; and M. Bayliss, L. Haas, and S. Reid, "Basically Good Production But a Weak Economy Marked 1980 Record," *Pulp and Paper* (August 1981), p. 67.

Table 6. — Solid Wood Trade Patterns, by U.S. Region, 1976

Region	Imports (millions of dollars)	Major supplier	Exports (millions of dollars)	Major customer	Trade balance (millions of dollars)
Pacific Northwest	422	Canada	1,246	Japan	824
South Atlantic	103	Far East	40	Europe	−63
Gulf	130	Far East	54	Europe	−76
North Atlantic	342	Canada	126	Europe	−216
South Pacific	82	Far East	90	Japan	8
Great Lakes	627	Canada	173	Canada	−454
North Central	230	Canada	36	Canada	−194
South Central	1	Mexico	6	Mexico	5
Alaska	1	Canada	77	Japan	76

*Excluding waste paper.

SOURCE: Sedjo and Radcliffe, *Postwar Trends in U.S. Forest Products Trade* (Washington, D.C.: Resources for the Future, 1980).

Table 7. — U.S. Exports of Solid Wood Products, 1981

Product	Quantity (thousands)	Value (thousands of dollars)	Percent of value
Logs and timber (board ft.)	2,534,224	$1,094,716	40.76%
Hardwood	157,125	91,868	3.42
Softwood	2,377,099	1,002,848	37.34
Pulpwood (cords)	176	9,911	.037
Wood chips (short tons)	3,546	290,184	10.80
Wood waste, wood fuel	NA	12,894	0.48
Lumber and railroad ties (board ft.)	2,374,055	923,784	34.40
Hardwood lumber	381,481	243,026	9.05
Softwood lumber	1,903,809	655,544	24.41
Railroad ties	88,765	25,214	0.94
Wood-based panels	NA	354,293	13.19
Softwood plywood and veneer	NA	189,727	7.06
Other	NA	164,566	6.13
Total	—	2,685,782	100.00

SOURCE: U.S. International Trade Commission.

Table 8. — U.S. Imports of Solid Wood Products, 1982

Product	Quantity (mbf[a])	Value (thousands of dollars)	Percent of total value
Logs and timber	117,032	$26,430	1.2%
Hardwood	18,268	3,500	0.2
Softwood	98,764	22,930	1.0
Pulpwood (including chips)	NA	56,248	2.5
Wood waste, fuel	NA	8,446	0.4
Lumber and railroad ties	9,200,075	1,665,312	73.2
Softwood lumber	8,973,652	1,567,931	68.9
Other	226,423	97,381	4.3
Wood-based panels	NA	519,585	22.8
Hardwood veneer and plywood	NA	402,798	17.7
Other	NA	116,787	5.1
Total		$2,276,021	100.0%

[a]mbf = million board feet.

SOURCE: U.S. International Trade Commission.

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No. 82-1608

In the Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether congressional consent to an Alaskan statute and regulations restricting the export of unprocessed timber cut from state-owned lands may be inferred from the existence of federal statutes and regulations imposing similar export restrictions on unprocessed timber cut from federally-owned lands.

2. Whether Alaska's restrictions on the export of unprocessed timber cut from state-owned lands are exempt from Commerce Clause scrutiny under the "market participant" doctrine.

3. Whether, in the absence of congressional consent, Alaska's restrictions on the export of unprocessed timber cut from state-owned lands constitute an impermissible burden on foreign commerce in violation of the Commerce Clause.

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INTEREST OF THE UNITED STATES

The principal question presented by this case is whether congressional consent to an Alaskan statute and regulations restricting the export of unprocessed timber cut from state-owned lands may be inferred from the existence of federal statutes and regulations imposing similar export restrictions on unprocessed timber cut from federally-owned lands. In response to the Court's invitation, we filed a brief at the petition stage expressing the view that this issue had been wrongly decided by the court of appeals and should be reviewed here. The United States has a significant interest in the outcome of this case because, in our submission, the court of appeals' holding that congressional authorization is not always necessary in order to validate an otherwise impermissible state burden on interstate or foreign commerce

constitutes a judicial restructuring of the constitutional allocation of power over the regulation of commerce. Furthermore, acceptance of the "implicit approval" theory would enable states to enact non-uniform and otherwise impermissible burdens on foreign commerce, resulting in unacceptable state interference with the conduct of the foreign relations of the United States.

STATEMENT

1. The State of Alaska, by statute, authorizes the State Commissioner of the Department of Natural Resources to condition the sale of timber from state-owned lands on "primary manufacture" within the State. The primary manufacture condition requires that the timber undergo certain processing in Alaska prior to being exported into interstate or foreign commerce. See Pet. App. 19a-21a.[1] The undisputed purpose of the primary manufacture requirement is to enhance local employment opportunities (see, *e.g.*, J.A. 53a, 55a); as the court of appeals noted, the primary manufacture requirement is "pointedly designed to favor [the State's] local timber processors" (*id.* at 139a).

In 1980, the State gave notice that a proposed sale of timber from state-owned lands (the "Icy Cape No. 2" sale) would be conditioned on primary manufacture in Alaska (J.A. 34a-35a). The State indicated that the condition was being imposed in order to ensure a continuing supply of timber for local processors during a period of temporary shortage of timber from federal lands (J.A. 41a).[2]

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[1] Alaska Stat. § 38.05.115 (1982) (Pet. App. 19a) provides that the "commissioner * * * shall determine the timber and other materials to be sold, the limitations, conditions and terms of sale." Pursuant to this statutory authority, Alaska has adopted regulations (Alaska Admin. Code tit. 11, § 71.130 (1974) (repealed 1982); Alaska Admin. Code tit. 11, §§ 71.230, 71.910(11) (1982); Pet. App. 19a-21a) authorizing the Commissioner to require primary manufacture within the State of timber cut from state-owned lands. In addition to the statute and regulations promulgated thereunder, the State legislature has passed various resolutions calling upon the Commissioner to impose the primary manufacture requirement (J.A. 52a-55a).

[2] While this was the reason given for imposing primary manufacture as a condition of the Icy Cape No. 2 Sale, Alaska advised the court of

Petitioner, an Alaskan corporation primarily engaged in the business of purchasing Alaskan timber, logging it, and shipping the logs almost exclusively to Japan, brought this action for injunctive relief in the United States District Court for the District of Alaska. Petitioner contended that because it does not own an operating mill in Alaska it would be effectively prevented from bidding on the Icy Cape No. 2 sale by the added expense of contracting with an in-state processor and asserted that the in-state primary manufacture requirement violates the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3) (J.A. 141a). Respondent Kenai Lumber Co., a competitor of petitioner's that does have an in-state processing mill, intervened in the action as a defendant.

2. The district court granted petitioner's motion for summary judgment and permanently enjoined the State from requiring in-state primary manufacture of state-owned timber (J.A. 127a-137a). The district court first rejected the State's contention that Congress has implicitly consented to Alaska's primary manufacture requirement by authorizing the imposition of export quotas on unprocessed timber cut from *federal* lands (J.A. 129a-131a). Notwithstanding congressional enactments with respect to federal lands (see pages 11-14, *infra*), the court noted that Congress "has in no way expressly exempted state timber laws from commerce clause restrictions" (J.A. 131a) and concluded that, in the face of congressional silence, "a negative is presumed to bar state action inimical to the national commerce" *(ibid.)*.

The district court also rejected the State's argument, made in reliance on *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), that it was acting in a proprietary capacity as a "market participant," rather than as a "market regulator," when it imposed the in-state processing requirement as a condition on the sale of its timber. The district court concluded that Alaska's primary manufacture requirement

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appeals that the State "usually" requires primary manufacture within the State in any event, apparently without regard to the amount of federal timber available for in-state processing. See C.A. Br. 6.

"goes beyond the *Alexandria Scrap* exemption, [because] a natural resource is involved" (J.A. 133a). The court explained its reasoning as follows (*ibid.*, quoting Hellerstein, *Hughes* v. *Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 71):

> The uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land.
>
> * * * The *Alexandria Scrap* general rule is not a magic talisman which allows a state to place unconstitutional restrictions on a resource if it is state-owned. While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not "attach conditions to the use or disposition of the resource that might independently burden interstate commerce. . . ."

Finally, the district court concluded that Alaska's primary manufacture requirement constituted an impermissible burden on interstate and foreign commerce under the test established by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (J.A. 133a-135a). The court found that the primary manufacture requirement does not regulate even-handedly, that its purpose of economic protectionism cannot justify the burdens imposed on commerce, that those burdens are substantial, and that the State could employ less burdensome means to achieve the same end (*ibid.*).

3. On the State's appeal, the Ninth Circuit reversed, and, in doing so, professed to avoid the constitutional issues (J.A. 138a-144a). The court of appeals found "implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands" (J.A. 139a). Without citation of authority, the court concluded that the express consent of Congress was not a prerequisite for the validation of otherwise impermissible state commercial regulations (J.A., 142a):

> The rule acknowledging congressional power to approve otherwise impermissible state regulation of in-

terstate commerce usually is applied in cases where Congress has expressly authorized such regulation, *see, e.g., Western & Southern Life Insurance Co.* v. *State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

Because the court of appeals found that "Congress has acted to validate the state policy" (J.A. 142a), it declined to pass on either the applicability of the *Alexandria Scrap* exemption or the district court's conclusion that Alaska's primary manufacture requirement constitutes an impermissible burden on commerce.

SUMMARY OF ARGUMENT

A. The court of appeals' "implicit approval" theory, adopted without citation of any authority, conflicts with a long line of decisions of this Court invalidating state restrictions on interstate or foreign commerce because congressional consent had not been "expressly stated." See, *e.g., Sporhase* v. *Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), slip op. 18; *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980). Moreover, the theory is virtually incapable of clear application; ascertaining whether a state enactment "parallels" federal policy is far more difficult than the court of appeals was willing to acknowledge. Any number of federal laws could be interpreted as establishing a "policy" on a particular matter, and the inferences to be drawn from those laws might easily be inconsistent. Thus, the "implicit approval" theory invites judicial speculation about what Congress "probably had in mind." *New England Power Co.* v. *New Hampshire*, 455 U.S. at 343. In addition, the theory also invites parochial discrimination against unrepresented interests; only a requirement of express congressional authorization ensures that unrepresented interests will have their views considered by the national legislature, entrusted by the Constitu-

tion with the responsibility for considering and reconciling competing policies.

This case clearly demonstrates the unsoundness of the "implicit approval" theory. Although it is true that the federal government has long followed a policy of requiring most timber cut from national forest lands in Alaska to be processed within that State, it has not done so for the protectionist purposes that Alaska seeks to advance. Rather, the federal interest is limited to ensuring adequate wood processing capacity in Alaska to handle *federal* timber; to the extent achievement of that interest also advances local economic interests, it does so only incidentally because Congress has never manifested any independent concern with enhancing local employment opportunities in the Alaska timber processing industry. Thus, Alaska's primary manufacture requirement, instead of "paralleling" federal policy, exceeds that policy in pursuit of a protectionist goal that Congress has not sanctioned.

Moreover, only once has Congress acted to restrict the sale of timber from state-owned lands, and on that occasion it specifically exempted Alaska from the restrictions. See Pub. L. No. 96-126, tit. III, § 308, 93 Stat. 980 (Pet. App. 30a). Thus, it would be more plausible to infer that Congress generally *favors* the unrestricted export of state-owned timber, and *disapproves* of any restrictions on timber exports from State of Alaska lands, than to conclude that Congress has "implicitly approved" the challenged Alaska practice. Nor need this conclusion rest on inference alone; Congress has given extensive consideration to the general subject of log export controls and has repeatedly refused the requests of western states for precisely the type of authority that Alaska is attempting to exercise in this case. Under these circumstances, the "implicit approval" theory cannot be sustained.

B. Alaska's primary manufacture requirement is not exempt from Commerce Clause scrutiny under the "market participant" doctrine. This Court has never applied the doctrine to sanction state hoarding of natural resources, nor has it applied the theory to state actions that have their primary impact on foreign rather than interstate com-

merce. Here, unlike the situation in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), the article of commerce that the State is attempting to block—unprocessed timber—is not a manufactured end product, produced by virtue of the State's "foresight, risk, and industry" *(Reeves*, 447 U.S. at 446) (footnote omitted), but is instead a vital natural resource that "by happenstance" is located within the State of Alaska. Moreover, Alaska's primary manufacture requirement takes the State out of the role of a participant in the timber industry and transforms it into a regulator in the timber *processing* industry. Such "downstream" regulation, where the State retains no proprietary interest in the end product (unlike the City of Boston's continuing interest in the city-funded construction projects considered in *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983)), has never been sanctioned by this Court. Finally, the effect of Alaska's primary manufacture requirement is visited almost exclusively upon foreign commerce because there is no viable domestic market for Alaskan wood products. The "market participant" doctrine, which is based at least in part on notions of federalism and considerations of state sovereignty (*Reeves*, 447 U.S. at 438), should not be extended to situations burdening foreign commerce.

C. In the absence of congressional consent, Alaska's primary manufacture requirement is clearly an impermissible burden on foreign commerce. While the requirement would fail to pass constitutional muster even under the "flexible" test enunciated in *Pike* v. *Bruce Church, Inc.*, *supra*, that test is inappropriate here both because the challenged state regulation was adopted solely for the purpose of economic protectionism and because the burdens that the State would impose on foreign commerce intrude on Congress's exclusive authority to determine the foreign policy of the United States.

Alaska's primary manufacture requirement is precisely the type of protectionist state regulation that this Court has repeatedly struck down under "a virtually *per se* rule of invalidity." *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). The Court has adopted such a rule because

the animating purposes of the Commerce Clause are most threatened by "a law that overtly blocks the flow of interstate commerce at a State's borders." *Ibid.* Alaska's primary manufacture requirement does just that with respect to unprocessed timber, and thus it is subject to the rule of *per se* invalidity.

In addition, this Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), establishes that Congress's power over foreign commerce is even greater than it is over interstate commerce. The Nation's need to speak "with one voice" on the subject of export controls cannot be questioned. Moreover, Congress has legislated extensively on the subject of export controls, and it has narrowly limited the circumstances in which it is willing to tolerate their adverse effects. Alaska's ban on the export of unprocessed timber is not among the controls that Congress has sanctioned, and it therefore cannot withstand scrutiny under the foreign Commerce Clause.

ARGUMENT

ALASKA'S PRIMARY MANUFACTURE REQUIREMENT VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

A. Congressional Consent To Otherwise Impermissible State Regulation Of Commerce May Not Be Implied From "Parallel" Federal Policies

1. The court of appeals' holding (J.A. 142a) that express congressional authorization "is not always necessary" to validate otherwise impermissible state regulation of interstate commerce conflicts with a consistent line of decisions of this Court. When Congress has exercised its "undoubted power to redefine the distribution of power over interstate commerce" (*Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)), it has always done so expressly. See, *e.g.*, *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 654 (1981) (Congress "explicitly intended" the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, to authorize state taxing and regulatory powers over the insurance business); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946) (state tax on foreign insurance companies upheld in view of "positive expression" in the

McCarran Act); and *Whitfield* v. *Ohio*, 297 U.S. 431, 438-439 (1936) (Hawes-Cooper Act, 49 U.S.C. 60, expressly removed restrictions on state regulatory power over convict-made goods shipped in original packages in interstate commerce). Most recently, in *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), the Court upheld a "local hire" executive order issued by the Mayor of Boston, insofar as it was applied to projects supported in part with funds from federal programs, only because it was found to be *"affirmatively sanctioned* by the pertinent regulations of those programs," and thus exempt from the restraints of the Commerce Clause. *White*, slip op. 11 (emphasis added).

The requirement that Congress expressly consent to otherwise unconstitutional state restraints on interstate or foreign commerce is confirmed by several recent decisions invalidating state laws when congressional authorization was lacking. In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court rejected the contention that a Florida law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by Sections 3(d) and 7 of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(d) and 1846, finding "nothing in [the Act's] language or legislative history to support the contention * * *" (447 U.S. at 49). In *Sporhase* v. *Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), Congress was found not to have consented, in various federal statutes that defer to state water law, to a Nebraska statute restricting the export of groundwater from the state. Significantly for the present case, the Court noted that in each prior instance in which congressional consent was found in a federal statute, it was "expressly stated." *Sporhase*, slip op. 18. Finally, in *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982), the Court declined to read Section 201(b) of the Federal Power Act, 16 U.S.C. 824(b), as giving congressional consent to a New Hampshire statute prohibiting the exportation of hydroelectric energy produced within its borders by a federally-licensed facility:

> [W]hen Congress has not "expressly stated its intent and policy" to sustain state legislation from attack un-

der the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress "probably had in mind." See *United States* v. *Public Utilities Comm'n of California*, 345 U.S., at 319 (Jackson, J., concurring); see also *id.*, at 311.

The unprecedented "implicit aproval" theory of the court of appeals directly conflicts with the holding in *New England Power Co.*, set forth above. The theory invites the courts to resort to "mere speculation" about what Congress "probably had in mind" in order to determine whether Congress, in enacting a statute regulating commerce, tacitly authorized states to impose parallel but otherwise impermissible burdens on interstate and foreign commerce. The uncertainties inherent in the application of the "implicit approval" theory are well-illustrated by the case at hand; as we demonstrate in the next section of this brief (see pages 11-14, *infra*), the relevant congressional enactments more readily support the conclusion that Congress would *disapprove* of Alaska's primary manufacture requirement than the contrary conclusion reached by the court of appeals.

What is more, the requirement of express congressional consent to otherwise invalid state laws is not grounded solely on a desire to avoid judicial speculation. It also implements the constitutional allocation of power over the regulation of commerce. From the earliest days of the Republic, this Court saw the danger to the Nation's economy if state legislatures, in which local interests alone are represented, were free to pass statutes that discriminated against interstate commerce. See *M'Culloch* v. *State of Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Later, the Court extended this reasoning and struck down under the Commerce Clause statutes that discriminated against unrepresented out-of-state interests. See *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489, 499 (1887); see also *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940). The requirement of explicit congressional approval for discriminatory state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from

parochial discrimination. See generally J. Ely, *Democracy and Distrust* 83-84 (1980). It assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views. Cf. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 Harv. L. Rev. 682, 695 (1976). The "implicit approval" theory, on the other hand, strips away this opportunity from the national representatives of the burdened interests and gives the initiative instead to state legislatures. As the Court recognized in *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 543 (1949), "[i]t is, of course, a quite different thing if Congress through its agents finds * * * restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity." The net effect of the "implicit approval" theory is therefore to make it harder to check "the tendencies toward economic Balkanization" (*Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979)) that the Commerce Clause was designed to prevent.

2. It is undisputed that Congress has passed no law expressly authorizing Alaska's restrictions on the sale of timber from state-owned land. Nevertheless, the court of appeals held that Congress has given "implicit approval" to Alaska's primary manufacture requirement because the State's policy allegedly parallels federal policy with respect to timber cut from *federal* lands. J.A. 139a. As we have just demonstrated, the "implicit approval" theory is contrary to a consistent line of decisions from this Court. But even if it were not, the inferences to be drawn from the "parallel federal policy" with respect to federal lands are uncertain at best, thus making the "implicit approval" theory particularly inappropriate in this case.

It is true, as the court of appeals recognized (J.A. 142a), that, pursuant to authority granted by Congress in the Organic Administration Act of 1897, 16 U.S.C. 475 and 551 (Pet. App. 22a-23a), the Secretary of Agriculture has since 1928 restricted the export of unprocessed timber cut from

national forest lands in Alaska. 36 C.F.R. 223.10(c).[3] But the objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 16 U.S.C. 475 (Pet. App. 22a), is to secure "favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States." With respect to timber cut from national forest lands in Alaska, the statutory objective of furnishing a continuous supply of timber is further amplified by the implementing regulation; 36 C.F.R. 223.10(c) explains that restrictions on the export of unprocessed timber cut from national forest lands in Alaska are "necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities." Thus, the federal interest, as expressed by statute and regulation, is in ensuring adequate wood processing capacity to handle *federal* timber in order to guarantee sustained utilization of that timber; neither Congress nor the Secretary of Agriculture has manifested any separate concern with enhancing local employment opportunities, and to the extent federal policy has that effect, it is only an incidental by-product of the federal interest in maintaining sufficient processing capacity to handle *federal* timber.

Alaska's primary manufacture requirement, on the other hand, operates not only to ensure a continuous supply of timber but has as an express and independent purpose the protection of in-state manufacturers from out-of-state competition. See, *e.g.*, J.A. 55a. Thus, it may well be that the federal lands restriction contained in 36 C.F.R. 223.10(c) fully satisfies Congress's intent to assure a continuous supply of timber for the United States, while Alaska's requirement continues to operate in pursuit of a protectionist aim that Congress has not endorsed. The possibility that this is so illustrates the difficulty courts would have in ascer-

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[3] Exportation of privately-owned timber is also restricted to the extent such exports are made possible by the purchase of national forest timber. See 36 C.F.R. 223.10(a)(1) and (4).

taining whether an ostensibly "parallel" state statute is pursuing independent policy goals under the cloak of a federal statute whose policy goals have already been fulfilled.

In addition to the restriction on exportation of unprocessed timber cut from national forest lands in Alaska, the court of appeals relied (J.A. 142a-143a) on another federal statute that imposed a log export quota, in effect between 1969 and 1973, on logs cut from all *federal* lands located west of the 100th meridian (a line running from central North Dakota through central Texas). 16 U.S.C. 617. In 1973, the quota was replaced by a series of annual riders to appropriation acts that prohibit the Secretaries of the Interior and Agriculture from using appropriated funds to export timber from federal lands west of the 100th meridian in the *contiguous* 48 states (*i.e.*, *not* including Alaska). See, *e.g.*, Pub. L. No. 96-126, Tit. III, § 301, 93 Stat. 979 (Pet. App. 29a). See also 36 C.F.R. 223.10(b) (Department of Agriculture regulation implementing export ban). Significantly, the annual appropriation riders and the implementing regulation limit only the *foreign* export of unprocessed timber cut from federal lands; they do not require in-state processing before the timber may be sold in *domestic* interstate commerce. Thus, to the extent that Congress may have expressed a concern for protecting the domestic timber processing industry, it has done so on a national rather than state basis. Under these circumstances, there is no reason to suppose that Congress would give express approval to single-state protectionist legislation; on the contrary, it has actually declined to do so (see page 14 & note 4, *infra*). Again, therefore, the court of appeals presumed too much when it concluded that Alaska's "primary manufacture requirements duplicate those imposed on federal timber and serve the same objective * * *" (J.A. 143a).

Only once has Congress passed a law restricting the sale of timber from *state*-owned lands, and that enactment provides no support for the court of appeals' decision. Under the authority of the Export Administration Act of 1979, 50 U.S.C. (Supp. V) App. 2406(i)(1) (Pet. App. 28a-29a), Congress acted to impose export quotas from 1979 to 1982 on

unprocessed western red cedar logs (a rare species of timber in short supply) and to ban their export thereafter. At the same time, however, Congress specifically exempted from the quotas and ban western red cedar logs cut from *Alaskan* lands. See Pub. L. No. 96-126, tit. III, § 308, 93 Stat. 980 (Pet. App. 30a). Thus, contrary to the assumption drawn by the court of appeals, it would be more plausible to infer that Congress *favors* the unrestricted export of all timbers (except red cedars) from state lands, and *disapproves* any restrictions on timber exports from State of Alaska lands. Certainly, the pertinent federal enactments do not support the court of appeals' conclusion that Alaska's primary manufacture requirement "could not have been more in keeping with federal timber policy" (J.A. 144a).

Finally, the "implicit approval" theory is particularly ill-suited to the particular circumstances of this case because Congress has in fact given the subject of log export controls considerable attention, but has declined to take any action authorizing state regulation of the type enacted by Alaska. In 1981, for example, Congress was informed of the district court's decision in this very case and was asked in response to that decision to "grant[ ] the States authority to pass laws regarding domestic manufacturing * * *." *Prohibit Export of Unprocessed Timber: Hearing on H.R. 639 Before the Subcomm. on Forests, Family Farms, and Energy of the House Comm. on Agriculture*, 97th Cong., 1st Sess. 18-19 (1981). Notwithstanding strong support from the western states, Congress failed to provide the states with the requested authority.[4] The court of appeals was thus plainly out of bounds in sanctioning state commercial restrictions that not only have not received Congress's "implicit approval," but have in fact been *expressly rejected* after congressional consideration.

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[4] The unsuccessful 1981 measure is not the only time Congress has considered this subject. As elaborated in petitioner's brief, Congress has debated this issue for more than a decade. Yet, with the exception of the special provision for western red cedar logs previously described, Congress has enacted no general law authorizing export restrictions on timber cut from state-owned lands.

3. The "implicit approval" theory is especially dangerous in this case because it directly implicates the commercial relations of the United States with other nations. In addition to Alaska, three other western states—California, Oregon, and Idaho—restrict the export of unprocessed timber. See Pet. App. 36a-38a. Because most of the timber exported from those states is purchased by Japan,[5] the primary impact of these state statutes falls on foreign commerce. The result is state interference with foreign commerce, which is, of course, "preeminently a matter of national concern." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1978).

It is evident that the "implicit approval" theory would have a far-reaching effect on the federal government's power over foreign commerce. See pages 24-26, *infra*. Under the theory of implied congressional consent, states would be free to enact non-uniform and otherwise impermissible burdens on foreign commerce without any focused consideration and decision by the national legislature. In our submission, that doctrine carries too great a risk that the foreign relations of the United States will be adversely affected by an unintended reallocation of the commerce power that the Constitution placed in the keeping of Congress. The court of appeals' novel approach to Commerce Clause analysis should be therefore rejected by this Court.

B. Alaska's Primary Manufacture Requirement Does Not Fall Within The Scope Of The "Market Participant" Doctrine

Although the market participant issue was not decided by the court of appeals (J.A. 141a-142a), Alaska apparently intends to argue in this Court that it furnishes an alternative basis for affirmance. See Br. in Opp. 10-14. We sug-

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[5] As noted by petitioner (Pet. 3 n.2), Japan, in 1980, purchased 90% of the $1.4 billion of unprocessed logs exported from Washington, Oregon, Alaska, and California. F. Ruderman, *Production, Prices, Employment and Trade in Northwest Forest Industries, Second Quarter 1982*, at 19 (U.S. Forest Service 1982). The State of Washington, which does not have an in-state processing statute, received $1.034 billion of the $1.4 billion total. Ruderman, *supra*, at 17-19.

gested in our brief at the petition stage (at 5, 11) that the case should be remanded to the court of appeals for resolution of this issue, and the Court may wish to follow that approach. In the event the Court decides to resolve the question itself, however, we set forth our views for the Court's consideration. In our submission, Alaska's primary manufacture requirement cannot escape Commerce Clause scrutiny under the market participant doctrine. The requirement was imposed with a regulatory, protectionist motive (enhancement of local employment), and the Alaska situation fits neither the fact patterns of this Court's previous market participant decisions nor the policies behind the creation of the market participant doctrine.

The Court was asked for the first time in *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), "to decide whether state and local governments are restrained by the Commerce Clause when they seek to effect commercial transactions not as 'regulators' but as 'market participants.'" *White*, slip op. 2. *Alexandria Scrap* involved a Maryland statute designed to encourage the recycling of abandoned automobiles by offering a "bounty" for every Maryland-titled automobile converted to scrap. The statute as initially passed did not require scrap processors to present documentation of ownership for automobiles over eight years old ("hulks"); in 1974, however, the statute was amended to require such documentation, and the amendment imposed more exacting documentation requirements on out-of-state scrap processors than on in-state scrap processors. As noted by the Court, the practical effect of the amendment, which made it less remunerative for suppliers of automobiles to transfer their vehicles outside of Maryland, "was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." *Alexandria Scrap*, 426 U.S. at 803 n.13.

The appellee in *Alexandria Scrap*, a Virginia scrap processor licensed under the Maryland program, contended that the Maryland statute, as amended, "violated the Com-

merce Clause by interfering with, or 'burdening,' the flow of bounty-eligible hulks across state lines * * *" (426 U.S. at 802). The Court disagreed, holding that the Maryland statute was not subject to Commerce Clause analysis and noting that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others" (*id.* at 810) (footnote omitted). In support of its conclusion, the Court noted that "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price." *Id.* at 806.

In the next case to apply the market participant theory, *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), the Court upheld the right of the State of South Dakota to restrict the sale of cement produced by a state-owned plant to state residents. The Court rejected the argument that the decision to sell cement to state residents only was "protectionist" and thus *per se* invalid under *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978), by noting that the decision was "'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve." *Reeves*, 447 U.S. at 442. The Court also rejected the contention that the *Alexandria Scrap* rule should not be invoked to allow a state to hoard resources by distinguishing cement from natural resources "like coal, *timber*, wild game, or minerals." 447 U.S. at 443 (emphasis added). After noting that South Dakota neither limited access to the raw materials used to make cement nor barred resale of its cement outside the State, the Court concluded that "[w]hatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there" were not applicable to South Dakota's case. *Id.* at 444. Finally, the Court expressed its reluctance to penalize the "foresight, risk, and industry" demonstrated by South Dakota's entry into the cement-manufacturing business. *Id.* at 446 (footnote omitted); see also *id.* at 444 n.17.

The most recent case to consider the market participant doctrine is *White* v. *Massachusetts Council of Construction Employers, Inc.*, *supra*. In *White*, the Court considered a Commerce Clause challenge to an executive order issued by the Mayor of Boston requiring all construction projects funded in whole or in part with city funds, or funds that the city had authority to administer, to be performed by a work force consisting of a least half *bona fide* residents of Boston. The Court upheld the executive order, to the extent it applied to projects funded entirely by city funds, under the market participant doctrine. *White*, slip op. 10-11.[6] The Court concluded that the city is participating in the marketplace when it expends only its own funds in entering into construction contracts for public projects. *Ibid.* Although recognizing that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business" (slip op. 7 n.7), the Court determined that those limits had not been transgressed by the Mayor's executive order because the order "cover[ed] a discrete, identifiable class of economic activity in which the city is a major participant," so that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Ibid.*

In the present case, Alaska argues (Br. in Opp. 11) that its primary manufacture requirement "constitutes direct participation in the market, rather than regulation of private trade in the timber market," relying primarily on *Reeves*, which Alaska asserts is similar to the instant case "in every significant respect" (Br. in Opp. 12). Alaska finds the following similarities between its situation and *Reeves*: (1) both involve a condition placed on the sale of state-owned property; (2) the properties in question both involve investment of state dollars;[7] (3) the challenged sale restric-

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[6] The Court also upheld the order, to the extent it applied to projects funded in part with federal funds, by finding that the order was "affirmatively sanctioned" by federal regulations. *White*, slip op. 11. See page 9, *supra*.

[7] Petitioner disputes this assertion, arguing that "there is no evidence in the record to support [Alaska's] contention * * *." Pet. Reply

tions both apply only to the immediate parties with whom the state is transacting business;[8] and (4) neither involves an attempt to hoard natural resources located within the state. Br. in Opp. 12-13.[9]

In our submission, Alaska fails in its attempt to bring itself within the market participant doctrine. The critical distinction between Alaska's imposition of the primary manufacture requirement and the stricter documentation requirements for out-of-state scrap processors at issue in *Alexandria Scrap* is that, unlike Alaska, Maryland neither prohibited the flow of commerce in "hulks" nor regulated the conditions under which that flow occurred. Whereas the hulks remained in Maryland in response to market forces, including those exerted by Maryland as a purchaser, the timber in this case would remain in Alaska for processing not in response to market forces but solely because Alaska, by requiring primary manufacture as a condition of sale, has prohibited the timber in question from being exported in its unprocessed state.

Although Alaska argues that its situation is the same as the situation in *Reeves*, the facts do not support that contention. The present case would be analogous to *Reeves* only if Alaska, instead of requiring in-state timber processing as a condition of sale, limited the sale of its timber to state residents.[10] In *Reeves*, the Court stressed that a state, like a private business, should be free to choose the

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Br. 8 n.10. We, too, find the assertion to be of dubious validity. See page 20 note 11, *infra*.

[8] Alaska argues that, just as South Dakota residents are free to resell cement to out-of-state purchasers, a purchaser of state-owned timber is free to export and sell the timber once the primary manufacture requirement is satisfied. Br. in Opp. 12-13.

[9] Alaska's argument that its primary manufacture requirement does not result in the hoarding of resources is based on the fact that it is only one of many owners of commercial timber land in Alaska. Br. in Opp. 13.

[10] Such a restriction, however, would be a clear attempt to hoard natural resources, rather than the products manufactured from such resources. As such, it would likely fall outside the limits of the market participant doctrine as articulated in *Reeves*. *Reeves*, 447 U.S. at 443. See pages 21-22, *infra*.

parties with whom it wishes to deal. *Reeves*, 447 U.S. at 438-439. Alaska, however, by imposing its primary manufacture requirement, is not selecting the parties to whom its wishes to sell its timber, but is instead selecting the timber *processors* with whom its purchasers must deal with respect to the processing of the purchased timber. South Dakota did not bar the resale of the item sold (cement) outside the state, whereas Alaska does prohibit the resale of unprocessed timber outside Alaska. Alaska's in-state processing requirement thus goes beyond the selection of bargaining partners, which was at the heart of *Alexandria Scrap* and *Reeves*, and constitutes "a direct attempt to govern private economic relationships." *White*, slip op. 4 (Blackmun, J., concurring in part and dissenting in part).[11]

In Alaska's behalf, it might be said that this case more closely resembles the governmental action upheld in *White*, which was decided after the district court's decision in this case. Alaska conditions the sale of its timber on the requirement that it be processed in Alaska; in *White*, Boston conditioned its contracts for city-funded construction projects on the requirement that work under the contracts be performed by a work force composed of at least half city residents. While both situations thus appear to involve the imposition of restrictions that impact beyond the contracting parties, the Court in *White* still treated the city's executive order as being within the city's right to select its bargaining partners. See *White*, slip op. 7 n.7.

Notwithstanding this similarity, however, the Alaska timber processors cannot be characterized, even in an informal sense, as "working" for the State, and the primary manufacture requirement cannot be justified as part of the State's right to select the partners with whom it will deal. Although Alaska may be a *participant* in the *timber* market, and therefore perhaps entitled to some leeway in the

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[11] As noted by petitioner (see pages 18-19 note 7, *supra*), Alaska's situation is also distinguishable from *Reeves* on the ground that Alaska has not expended any "foresight, risk, and industry" (*Reeves*, 447 U.S. at 446) (footnote omitted) to bring about the happenstance of inheriting commercial timber lands from the federal government.

selection of those to whom it chooses to sell timber (but see *Hicklin* v. *Orbeck*, 437 U.S. 518, 532-533 (1978), and cases cited therein), the imposition of the primary manufacture requirement transforms the State into a *regulator* in the timber *processing* market. The in-state processing requirement clearly constitutes "downstream" regulation, *i.e.*, an attempt to impose restrictions beyond the initial disposition of the timber. See Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 92-93 (1980). The conclusion that Alaska is engaging in impermissible downstream regulation is strengthened by the fact that it retains no proprietary interest in the end product—processed timber.[12] Boston, on the other hand, was the "buyer" of the construction projects it financed, and thus it had a continuing proprietary interest in the administration of the funds it was expending, even if that interest affected the relationship between its contractors and their work forces. Accordingly, Alaska's primary manufacture requirement exceeds anything this Court has sanctioned in its previous market participant decisions.

Moreover, paramount national interests counsel against extending the market participant doctrine to Alaska's primary manufacture requirement. First, the Court has never employed the doctrine to sanction state regulation of natural resources. As noted by the district court (J.A. 133a), "[t]he uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow," remove this case from the general rule of *Alexandria Scrap*. Cf. *Hicklin* v. *Orbeck*, 437 U.S. at 532-533.

In addition, none of this Court's previous market participant decisions has involved foreign commerce. It is not at all clear that the market participant doctrine should ever

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[12] See *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 13 (1928) (requirement for in-state processing of shrimp struck down because "by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control").

extend to such situations (cf. *Reeves*, 447 U.S. at 438 n.9), in part because it rests on "considerations of state sovereignty" (*id.* at 438) (footnote omitted) that carry great force in the domestic context but must give way in the face of state attempts to burden foreign commerce. As the Court explained in *Japan Line*, 441 U.S. at 449 n.13:

> In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism or state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could ever be so limited.

In short, this case, involving state regulation of a vital natural resource having a substantial effect on foreign commerce, requires the Court to establish some of the "limiting principles" of the market participant doctrine, the absence of which so troubled the dissenting Members of the Court in *Reeves* (see *Reeves*, 447 U.S. at 453 (Powell, J., dissenting)).

C. Alaska's Primary Manufacture Requirement Impermissibly Burdens Foreign Commerce

Again, because it found "implicit" congressional approval, the court of appeals did not determine whether Alaska's primary manufacture requirement impermissibly burdens foreign commerce. Accordingly, we set forth our views on the question for the Court's consideration in the event that a remand is deemed unnecessary.

The district court analyzed this issue under the test established in *Pike* v. *Bruce Church, Inc.*, *supra* (J.A. 133a-135a). Even applying that "flexible approach" (*City of Philadelphia* v. *New Jersey*, 437 U.S. at 624), the district court held that Alaska's primary manufacture requirement exceeds permissible Commerce Clause limits, and we agree. In our view, however, two independent factors make *Pike*'s general balancing test inappropriate here. First, the purpose of the challenged state regulation calls for especially strict scrutiny. Equally important, the burdens of Alaska's primary manufacture requirement have their impact almost entirely on foreign rather than interstate com-

merce. This factor likewise compels more rigid constitutional scrutiny. And in combination, the two factors mandate the conclusion that Alaska's regulation cannot stand.

1. Alaska's primary manufacture requirement is precisely the type of protectionist state regulation that this Court has repeatedly struck down under "a virtually *per se* rule of invalidity" (*City of Philadelphia* v. *New Jersey*, 437 U.S. at 624). See, *e.g.*, *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949) (state may not prohibit facilities to acquire and ship milk in interstate commerce in order to protect and advance local economic interests); *Toomer* v. *Witsell*, 334 U.S. 385 (1948) (state may not require shrimp fishermen to unload, pack, and stamp their catch at an in-state port prior to shipping it in interstate commerce). As the Court explained in *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 145:

> [T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.[13]

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[13] There is no question that Alaska's primary manufacture requirement results in requiring in-state performance of business operations that could more efficiently be performed elsewhere. Alaska forthrightly admitted in the court of appeals that it suffers a financial loss by insisting on primary manufacture within the State (C.A. Br. 33-34):

> When the State of Alaska decides to sell state-owned timber subject to a primary manufacture requirement, the state decides to forego increased stumpage rates for its timber in return for benefits to the State's wood-processing industry.

Similary, respondent Kenai Lumber Co. explained that (C.A. Br. 6):

> When the State sells its timber subject to primary manufacture, the timber is worth less to the state's purchaser than it would be if sold without primary manufacture. The State foregoes the difference in revenue in order to aid the Alaska wood processing industry and its employees.

The Court's hostility to protectionist state legislation finds its roots in the fundamental purpose of the Commerce Clause, reaffirmed only recently in *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979):

> The few simple words of the Commerce Clause * * * reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

The "clearest example" of invalid protectionism is "a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia* v. *New Jersey*, 437 U.S. at 624. Alaska's primary manufacture requirement, by blocking the flow of unprocessed logs at the State's borders, is just such an invalid law. It is no answer to say, as Alaska does (Br. in Opp. 12-13), that the flow of commerce in *processed* timber is unrestrained; the fact remains that there is a substantial foreign market for *unprocessed* logs that Alaska blocks solely to protect its domestic timber processors. Such a restriction is subject to this Court's rule of "virtual *per se* invalidity," and should be struck down on that basis alone.

2. Nearly all of Alaska's timber is exported to Japan because distance and shipping costs under the Jones Act, 46 U.S.C. (Supp. V) 883, preclude a viable interstate market for Alaskan timber products. Thus, not only does this case involve the sort of economic protectionism that is virtually *per se* invalid, but the principal effect of Alaska's primary manufacture requirement is visited upon foreign commerce.

In *Japan Line*, 441 U.S. at 448, the Court unequivocally established that Congress's power over foreign commerce is even greater than it is over interstate commerce. The Court went on to explain (*id.* at 448-449) (footnote omitted) that:

> Foreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United

> States act through a single government with unified and adequate national power." *Board of Trustees* v. *United States*, 289 U.S. 48, 59 (1933). * * * [I]n discussing the Import-Export Clause, this Court, in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

It is not open to serious debate that the entire subject of export controls is one that must be left to the national government. Congress has legislated extensively in the field, leaving no room for states to interpose their own notions of proper policy. In the Export Administration Act of 1979, 50 U.S.C. (Supp. V) App. 2402(1), Congress established a national policy of "minimiz[ing] uncertainties in export control policy and * * * encourag[ing] trade with all countries with which the United States has diplomatic or trading relations * * *." To achieve this policy, Congress has narrowly and precisely identified the situations in which it is willing to tolerate the adverse effects of export controls. Export controls are thus generally limited to those situations necessary to maintain national security, significantly further the foreign policy of the United States, or preserve scarce materials for domestic use. 50 U.S.C. (Supp. V) App. 2402(2).[14] Accordingly, any restriction on log exports is

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[14] As previously noted, Congress has exercised its export control authority to preserve scarce western red cedar logs (except those from Alaska) for domestic consumption. See pages 13-14, *supra*. Any additional controls imposed by a state would obviously conflict with the congressional determination not to sanction general export controls on timber.

See also *Log-Exporting Problems: Hearings Before the Subcomm. on Retailing, Distribution, and Marketing Practices of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess., Pt. 3, 1383 (1968):

> Proposals to curtail log exports encounter an objection that the United States is committed to encouragement of international trade and general reductions of trade barriers. Under the Trade

clearly a matter within the exclusive province of the national government. Regardless of its motivations, Alaska's attempt to intrude on this sensitive area of foreign relations cannot be tolerated in our federal system.

CONCLUSION

The judgment of the court of appeals should be reversed, or, in the alternative, the judgment should be vacated and the case remanded for further proceedings to resolve the Commerce Clause issues that were not addressed by the court of appeals.

Respectfully submitted.

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Agreements Program started in 1934, the United States has aggressively moved to lower tariffs and to foster trade throughout the world. The General Agreement on Tariff and Trade (GATT) signed by the United States and some 60 other countries is dedicated to reduction of tariffs and other trade barriers. To curtail log exports would conflict with this basic policy.